IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

SECOND APPEAL NO.569 OF 2003

Shankar Rama Mukadam & Anr. ...Appellants.
Vs.
Govar Sitaram Mukadam
since deceased through his Lrs.
Keshav Govar Mukadam & Ors. ...Respondents.

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Mr. Anil Kumar Patil for the Appellants.
Ms. Gauri Godse for Respondent Nos. 1 to 6.

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CORAM :DR.D.Y.CHANDRACHUD, J.
July 10, 2007.

P.C.:

The Appellate Court has reversed the judgment of the Learned Trial Judge by which the suit for declaration and injunction was dismissed. As a result, the Appellate Court has decreed the suit instituted by the Respondent Plaintiff and has declared that the Plaintiff is the owner in possession of land bearing Survey Nos.256/5 admeasuring 2 gunthas and 256/14 admeasuring 5 gunathas of village Kharbav, Taluka Bhiwandi, District Thane. The Appellants herein, have been injuncted from disturbing the peaceful possession

and enjoyment of the property of the Respondent-Plaintiff.

In assailing the judgment of the Learned Additional District Judge, in appeal, Counsel appearing on behalf of the Appellants has submitted that the Appellate Court has principally relied upon the decree in Regular Civil Suit No. 101 of 1945 which was a suit instituted by one Nana Dhago Mukadam against Sitaram Dhago Mukadam, Kachier Sitaram Mukadam and the deceased Plaintiff in the present proceedings Govar Sitaram Mukadam. The Plaintiff in the earlier suit had claimed ownership of the property on the basis of the Sale Deed dated 5th April 1932 executed in favour of the Defendants to that suit. The suit was instituted for the recovery of possession. The suit was disposed of on 17th July 1946 with the findings that the nature of the transaction was of a simple mortgage and that the Plaintiff to that suit was only entitled to a refund of the amount of Rs.125/- together with interest. The amount was accordingly paid in instalments commencing from January 1947 by the Defendants to the earlier suit, including the predecessor-in-interest of the present

Respondents. On the basis of the aforesaid judgment, the Appellate Court held that a presumption arose in favour of the original Plaintiff that the suit property was an asset of the family of the Plaintiff and his brothers.

The reliance placed by the Appellate Court on the decree in the earlier suit is, however, sought to be questioned on the ground that the Appellants were not parties to the earlier suit. Moreover, it was urged that the judgment of the earlier suit will not be covered by the provisions of Sections 41, 42 or 43 of the Evidence Act. On the other hand, it has been urged on behalf of the Respondents that a perusal of the judgment of the Courts below would show that apart from the decree in the earlier suit, right from the year 1992, the revenue record stood in the name of the original Plaintiff and despite this, no proceedings were initiated by the Appellants before the competent forum to get the entries struck out. Moreover, the attention of the Court was drawn to para 12 of the judgment of the Learned Trial Judge in which there was a reference to Mutation Entry 3037 of

1992 in which the name of the Plaintiff was mutated in accordance with partition that had actually taken place. Counsel submitted that even the Trial Court has found that in so far as the Defendants are concerned, they were unable to establish on the basis of the evidence on the record that they were in possession but that was in respect of only one or two Gat numbers.

Having heard Counsel, this Court is of the view that the Second Appeal does not raise any substantial question of law so as to warrant interference of this Court having regard to the limited parameters of the jurisdiction in Second Appeal. Undoubtedly, the Appellate Court has drawn a presumption on the basis of the decree dated 17th July 1946 in Regular Civil Suit No. 101 of 1945 from which it emerges that the predecessor-in-interest of the Respondents was the owner of the land in question. However, a perusal of both the judgments of the Learned Trial Judge and that of the Appellate Court would show that apart from this material, the record contains proceedings which had been initiated as between the parties before

the revenue authority. In so far as the Respondent-Plaintiff is concerned, the mutation was carried out in the year 1992 on the basis of the partition that took place which was not contested at any stage thereafter by the Appellants. This aspect of the matter assumed importance because the Learned Trial Judge who eventually held against the original Plaintiff noted that the documentary evidence before the Court did not reveal that the Defendants were in possession. Unquestionably as the Learned Trial Judge held, the Plaintiffs were required to establish their own case on the basis of which they claimed title and possession. The judgment in the earlier proceedings would, in my view, prima facie, appear to be governed under Section 43 of the Evidence Act. A judgment other than one which is covered by Sections 40, 41 and 42 can be looked at where the existence of such judgment, order or decree which is passed is in issue. In so far as the Appellants are concerned, there is absolutely no basis at all to claim title or possession in respect of the land. As between the Appellants and the claim of the original Plaintiff, there was sufficient material before the Appellate Court to lead to the

inference that the original Plaintiff had title to the land and possession in respect thereof. Substantial justice has been done by the judgment of the Appellate Court and it cannot hence be held that any substantial question of law would arise in the Second Appeal. The Second Appeal is dismissed.

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